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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner,

VS.

CHARLESTONE STONE PRODUCTS CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE
and
BRIEF AMICUS CURIAE ON BEHALF OF J. ALAN STEELE

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MOTION TO FILE BRIEF AMICUS CURIAE

J. Alan Steele hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of amicus, appearing here pro se, arises from the fact that he is one of the original entrymen of the Chimese springs mining entry, the subject of the IBLA opinion, *Robert L. Beery,* 25 IBLA 287, presently on review *sub nom. Steele v. Kleppe,* N.D. Cal., Civ. No. C-76-1840-WHO. Amicus and his co-locators entered the subject lands in good faith and

claimed deposits of valuable mineral water therein, which were and remain unencumbered by any prior rights.

The question presented in this case is quite broad, and could impliedly include mineral waters. Neither the opinion of the IBLA in *Beery,* above, nor the arguments of the Secretary herein adequately distinguish between mineral waters and waters suitable for ordinary agricultural, industrial or domestic use. Nevertheless, the Secretary has urged this Court to yield to the interpretation of the Department, and has cited and relied upon the Department's opinion in *Beery,* infra, wherein the agency struck down the mining entry without regard for the facts or an adequate distinction. The action of the agency was based upon a naked proposition of law, to wit: that water is not a locatable mineral. The agency's decision was supported only by the argument and rationale set forth in the opinion, *Robert L. Beery,* 25 IBLA 287 (Pet. App. 59a et seq.).

On review, the District Court, Hon. William H. Orrick presiding, has indicated its perception that the issues involving the locatability of naturally occurring mineral spring water are of mixed fact and law, and that the case there may be ripe for remand for a full factual hearing under the doctrine of primary jurisdiction. No order to that effect has yet been entered.

The distinction between ordinary waters and mineral waters (widely recognized by standard authorities as a valuable mineral, and popularly sold in direct

competition with foreign imports), was not briefed by the petitioner, and is of no interest to the respondent, who made no such claim in the lower proceedings.

Therefore, Amicus prays leave to file the attached brief applying the proper distinctions to the matters argued in order that the Court will be aware of the import of the rulings sought by the contending parties.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE
J. ALAN STEELE, PRO SE

I

A. THE ARGUMENTS OF THE IBLA AND THE PETITIONER HEREIN FAIL TO DISTINGUISH BETWEEN MINERAL WATERS AND WATERS GENERALLY.

The arguments presented by the Dept. of Interior, trading upon a failure of distinction between "water generally" and "mineral waters", fail to acknowledge that mineral waters are recognized as a mineral in this country, and that the term 'mineral water' has a distinct and well-documented usage in the English

language and the mining industry predating the enactment of the 1872 General Mining Law.

Mineral waters are reported in Geological Reconnaissance of California, compiled in 1853, and in the report of the first state geologist of the state of California, and in the report of Rossiter W. Raymond, appointed Special Commissioner of Mining Statistics by the Hon. H. McCulloch, Secretary of the Treasury. Raymond's report, containing specific reference to mineral water production and value, was submitted to Congress, referred to the House Committee on Mines and Mining and ordered to be printed Jan. 21, 1869. Danas' Manual of Minerology[1] specifically defines mineral waters to be a mineral (1st Ed. at p. 80) and makes reference therein to the famous Saratoga Springs.[2] Since the time of the foregoing publications, mineral waters have regularly been classified as a mineral in trade and commerce by the official publications of the State of California,[3] the Dept. of Interior Bu-

[1]See Table of Mineral Authorities generally.

[2]These famous mineral springs were the subject of *Hathorn v. Natural Carbonic Gas Co.*, 87 NE 504 (1909), reciting the doctrine that subterranean waters containing salts or gases are a mineral. The case was cited and relied upon by the 9th Circuit in *U.S. v. Union Oil Co.*, 549 F.2d 1271, in support of that Court's holding that "water may be considered a mineral". The foregoing is in accord with Cal. Pub. Res. Code Sec. 2200 defining mineral waters of every kind and character to be a mineral.

[3]See Table of Mineral Authorities, particularly, the 1st through 58th Reports of The State Geologist; Cal. Div. of Mines Bulletin 167, Minerals of California.

reau of Mines and U.S. Geological Survey,[4] as well as by unofficial texts and treatises.[5]

The concensus of these authorities holds that only naturally occurring mineral waters bottled and sold for table or medicinal use are classified as a mineral, and that public supplies and waters used for ordinary domestic or general industrial purposes are excluded. The foregoing distinction is based on scientific as well as commercial definitions.[6]

The Act of May 10, 1872, 17 Stat. 91, 30 U.S.C., Sections 21 et seq., was clearly designed to promote the mining resources of the United States, and provides in Section 1 that "all valuable mineral deposits" in public lands shall be open for location and purchase. The continuing policy of congress to foster and encourage private enterprise in the development of all minerals has been restated in the National Mining and Minerals Policy Act of Dec. 31, 1970, 84 Stat. 1876, 30 U.S.C. Sec. 21a. The question as to whether water in any of its forms or uses is subject to location and within the ambit of the foregoing policy cannot be correctly resolved by ignoring the distinction between

[4]See Table of Mineral Authorities, particularly, Dept. Int. Mineral Resources of the U.S., 1883, 4, Peale, A. C., 1906, 7, 8, Sanford, S.; Springs of California, U.S.G.S. Water Supply Paper No. 338, Waring, G. 1915.

[5]See Table of Mineral Authorities, particularly, A. Ricketts, American Mining Law, 64, 70; Mineral Waters, Fitch; Mineral Springs, Anderson.

[6]See Dept. Int. Mineral Resources of the U.S. 1906, Sanford, at page 1166; Mineral Resources of the U.S. 1923, Part II, at page 109.

mineral waters and other waters as set forth by the standard authorities on the subject.

B. WHETHER A DEPOSIT OF ANY SUBSTANCE IS LOCATABLE IS A QUESTION OF FACT, AND OUGHT NOT TO BE DETERMINED AS A NAKED QUESTION OF LAW.

The Dept. of Interior has long since established the criteria for determining the mineral character of a deposit as being referable to the standard authorities. The standard authorities rule was published by circular and applied in the case of *In re Hooper,* 1 L.D. 560, and again in *Pacific Coast Marble Co. v. Northern Pac. Ry. Co.,* 25 L.D. 243. The rule was relied upon by the 9th Circuit in *Northern Pac. Ry. Co. v. Soderberg,* 104 F. 425 (1900), affd. 188 U.S. 526.

Pursuant to the duty imposed by the Administrative Procedure Act, the Secretary has promulgated and published the rule as follows:

> Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. 43 CFR, Sec. 3812.1

C. THE DEPARTMENT IS BOUND BY ITS OWN REGULATIONS

The Administrative Procedure Act provides that each agency shall separately state and currently publish in the Federal Register, for the guidance of the public, substantive rules and statements of general

policy or interpretation formulated or adopted by the agency. 5 U.S.C. Secs. 552 et seq. The agency is clearly bound by its own regulations, *Nader v. Nuclear Reg. Comm.* (C.A.D.C. 1975), 513 F.2d 1045; *U.S. v. Wilbur* (9th Cir. 1970) 427 F.2d 947, cert. denied 400 U.S. 945. Clearly, the question of whether any deposit is recognized by the standard authorities is a question of fact that can be determined on a case by case basis.

The 'prudent man test' was announced by the Dept. in 1894 in the case of *Castle v. Womble,* 19 L.D. 455, 457. The test has been consistently applied by the Dept. and repeatedly endorsed by this Court. See: *Chrisman v. Miller,* 197 U.S. 313, 322; *Cameron v. U.S.,* 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334; *U.S. v. Coleman,* 390 U.S. 599. In *Coleman,* this Court also approved the 'present marketability test' as "a logical complement to the 'prudent man test' which the Secretary has been using to interpret the mining law since 1894" (at p. 602). These tests also raise questions of fact that can be determined on a case by case basis. Traditionally, the ability of the Dept. to make such inquiry has served to protect the public from any abuse by a mining entryman. Both the rules and the tradition have served well and should be retained.

II

A. THE REASONS ADVANCED FOR DECLARING WATER NOT LOCATABLE ARE NOT APPLICABLE TO MINERAL WATER

In *Robert L. Beery,* 25 IBLA 287, when confronted with a clear and convincing prima facie showing, the Dept. of Interior abandoned its own regulations and the foregoing judicially approved criteria, and chose instead to issue an order of nullity and rejection based upon a naked proposition of law, namely, that water is not a locatable mineral. The above order and opinion was supported by a rationale roughly parallel to the contentions of the Secretary in his brief on the merits of the action presently under review.

The opinion of the IBLA suffers from a failure to adequately distinguish mineral waters from water rights generally, and this is nowhere clearer than the language of the opinion itself, as follows:

> "While this case (Chessman) deals with water generally, instead of mineral spring water, specifically, the principle is still the same. . . ."
>
> *Robert L. Beery,* 25 IBLA 287 (Pet. App. 61a).

B. THE DOCTRINE OF STARE DECISIS HAS BEEN MISAPPLIED BY THE IBLA

Notwithstanding the failure of distinction, the IBLA reached its initial conclusion under the doctrine of Stare Decisis (Pet. App. p. 63a). Briefly, the IBLA set forth 5 cases which it contends constitute precedent binding. However, closer analysis shows that the cases are not supportive of that proposition. Firstly; the IBLA cited and relied upon the decision in *U.S. v.*

Union Oil, 369 F.Supp. 1289, since reversed, 549 F.2d 1271, but misquoted the District Court as follows: "The strong weight of authority is that water was not considered to be a mineral" (Pet. App. 63a). The correct quotation of the text reads: "The strong weight of authority is that water was not considered to be a mineral within the test just stated. . . ." Id. at p. 1297. The test referred to is that set forth in *Fleming Foundation v. Texaco* (Civ. App. Tex. 1960) 337 S.W. 846, 852, reversal refused. The test[1] there used is amenable to a distinction between mineral waters and waters generally and reads as follows:

> "We are of the opinion that in deciding whether or not in a particular case exceptional substances are minerals that the true test is what the word means in the vernacular of the mining and mineral industry, the commercial world and the landowners at the time of the grant, and whether the particular substance was so regarded as a mineral." Id. at p. 852.

With respect to *U.S. v. Springer,* 8 IBLA 123 (1972), aff'd, 491 F.2d 239, cert. denied, 419 U.S. 834, the IBLA acknowledges that the locatability of mineral water was not at issue in the case (Pet. App. 62a). A review of the administrative and judicial proceedings discloses that the decision turned on a failure to show compliance with the prudent man rule.

With respect to *U.S. v. Beinick,* 14 IBLA 290, the decision involved the locatability of sand and gravel,

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[1]This test is compatable with the reference by this Court to definitions "generally accepted by text writers on the subject". *Northern Pac. Ry. Co. v. Soderberg,* 188 U.S. 526, at page 536.

and in no fashion touched upon the locatability of mineral water. Similarly, in a footnote (Pet. App. 63a), the IBLA made reference to *U.S. v. Gray,* A-20710 (May 18, 1962), but noted clearly that the case was not concerned with the locatability of mineral waters.

Of all the authority cited by the IBLA, there is only one case that approaches the question of the locatability of mineral waters—*U.S. v. Pagosa Springs,* 1 L.D. 562—and that case is wholly unreliable for the reasons below.

1. The case, if it was such, was decided 12 years before the formulation of the prudent man rule in *Castle v. Womble,* 19 L.D. 455 (1894).

2. The case, if it was such, was decided 65 years prior to the enactment of the Administrative Procedure Act, and was undertaken without the safeguards of that statute.

3. The case, if it was such, reflects no acceptable adjudication, findings or conclusions, but rather a declaration by the Secretary that is Ultra Vires on its face. Action by the Secretary purporting to make law usurps the function of the Legislature, and is quite beyond the power of the Dept. of Interior, the function of which is acknowledged to be limited to an examination of the facts. See, *U.S. v. State of California,* 55 LD. 179.

4. The text of *Pagosa* is set forth in the IBLA opinion at page 289 (Pet. App. 61a), with citations omitted. The true citation is to 9 C.L.O. 230. Copp's

Land Owner is not recognized as an official reporter, and the citation thereto suggests that *Pagosa* may not have been a true case and controversy under the mining law, or that the opinion may not have been the result of an actual adjudication.

5. During discovery proceedings in *Steele v. Kleppe,* Civil No. C-76-1840-WHO, the plaintiffs requested production of the administrative record of *Pagosa Springs* and received the following response:

> "With reference to request No. 1A(1), *U.S. v. Pagosa Springs,* 1 L.D. 562 (1882), the Bureau of Land Management, hereinafter BLM, has been unable to locate an administrative record in this case which is nearly 100 years old, nor is the BLM able to ascertain whether such a record ever existed." Original filed Nov. 24, 1976, U.S. Dist. Court, San Francisco, Ca.

The doctrine of Stare Decisis rests most uncomfortably upon a phantom case. So, too, deference to administrative interpretation is unwarranted where the interpretation at issue lacks the bona fides of jurisdiction, procedure and authenticity. Where, as in *Pagosa,* the notation reflects no regard for the standard authorities, nor for the standard authorities rule, nor for the prudent man rule, it should be given no weight.

C. ALTHOUGH ORDINARY WATERS MAY BE COMMON, THE ARGUMENT REJECTING LOCATABILITY OF WATER BECAUSE IT IS AKIN TO COMMON DIRT IS INAPPLICABLE TO MINERAL WATER.

In the opinion of the Dept. of Interior, the most compelling reason for holding water not to be locatable is that a contrary position would invite abuse (Pet. App. 68a) and the potential for abuse is formidable (Pet. Brief, p. 34). In this connection it should be noted that no such entry is possible on lands withdrawn by the President or the Secretary pursuant to the Pickett Act because the implementing statute permits entries for metalliferous materials only, The Act of June 25, 1910, 36 Stat. 847, amended, 1912, 43 U.S.C. Sec. 142, since repealed leaving existing withdrawals intact, The Federal Land Policy and Management Act of 1976, Oct. 21, 1976, 90 Stat. 2743, Secs. 702, 704, 43 U.S.C. Sec. 1701.

Moreover, pursuant to Sec. 2311.0-3 et seq., 43 C.F.R., all springs and waterholes capable of public use for general watering purposes are subject to withdrawal. The only unreserved sources of mineral waters remaining locatable are those so small as to afford only enough water for one family and its domestic animals. Thus it would seem that the public interest is adequately protected and that the potential for abuse has already been controlled. While water may exist in widespread abundance, there is no reason to believe that deposits of commercially valuable mineral spring water on unreserved public domain land abound. At the very least, there remains an untested

question of fact upon which the propriety of the Department's fears must rest.[8]

The subsidiary argument to the effect that mining entries for water would fail to produce the traditional gains (Pet. for Cert. p. 13) is also ill-adapted to entries for mineral water, which promise to place a valuable commodity into the stream of commerce. The development and exploitation of mineral waters requires specialized techniques and equipment for purification, bottling, capping, and labeling. The expenditures for the foregoing, as well as for construction, maintenance, labor, shipping, taxation, advertising and marketing—all of which are supported by the mining enterprise—clearly constitute the traditional gains from the exploitation of the mineral resources of the public lands.

III

A. THE POTENTIAL CONFLICTS CITED BY THE SECRETARY ARE BASED UPON A MISUNDERSTANDING OF THE LAW, AND DO NOT APPLY TO MINERAL WATER.

The Secretary argues that the effect of the water rights provisions of the mining law is to render water disposable only in accordance with state law, and thus, "it could not at the same time be disposed of under

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[8]This question was never raised in *Robert L. Beery*, 25 IBLA 287, nor was any evidence on the question adduced. In the instant case, Petitioner has set forth certain figures on the amount of public domain land, but has neither shown nor asserted that mineral waters exist thereon in substantial amounts.

the general mining law." (Pet. App. 70a, Pet. Brief, p. 11). The effect of these provisions is discussed at length in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 144. The Court there indicated that the provisions constituted a voluntary recognition of a pre-existing right of possession, rather than the establishment of a new one, and that the intent of Congress was to make it clear that the Grantees of the United States would take their lands charged with the existing servitude (id. p. 155). The language of the Court does indicate that the rule reaches into the future and applies to mining entries. But, far from raising (new) potential conflicts, the rule states the manner in which such conflicts are to be settled, and places a limitation on the entryman with respect to prior rights. To the extent that the law protects prior appropriators it is not mere surplusage, and yet in the absence of a prior right, the rule cannot be said to preclude a mineral entry.

In discussing the effect of the Desert Land Act, 19 Stat. 377, 43 U.S.C. Sec. 321, The IBLA (Pet. App. 69a, 70a) and the Secretary (Pet. Brief, p. 21 et seq.) take the position that water—impliedly including mineral water—can only be disposed of in accordance with state law, and therefore could not be disposed of under federal law. That position does not square with the opinion of this Court.

> "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the control of the designated states . . . with

> the right of each to determine for itself to what extent the rule of appropriation or the common law rule of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state' Kansas v. Colorado, 206 U.S. 46, 94 . . . the Desert Land Act does not bind or purport to bind the states to any policy. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, at pages 163, 164.

Thus, if the states sanction a mining entry for mineral water (even with legal or equitable limitations), or if such entry is not prohibited by state law, then appropriation under the mining law does not offend the provisions of the Desert Land Act, and there is no reason for this Court to declare that mineral waters are not locatable on that account.

B. THE EXPLOITATION OF MINERAL WATERS CAN BE CONTROLLED WITHOUT DECLARING SUCH DEPOSITS NOT TO BE A MINERAL.

The potential difficulties regarding the disposition of mineral waters are similar to those encountered in the exploitation of other liquid minerals such as oil and geothermal steam. Legislative solution of these difficulties has been achieved by the enactment of leasing laws. Most recently, the legislation concerning geothermal steam preceded the judicial determination that the deposits are mineral in nature. See, The Geothermal Steam Act, Oct. 21, 1970, 30 U.S.C., §1001 et seq.

In the instant case, the Court's finding that mineral entry of lands containing valuable deposits of natural mineral spring water is not barred would provide the Secretary with a settled basis upon which to seek any legislation required to clarify and protect the public interest. And although the task is not beyond the ability of the courts, facility may be gained by amplifying legislation.

CONCLUSION

For the foregoing reasons, if the Court should hold water not locatable, it should not also prohibit bona fide mineral entry for valuable deposits of natural mineral water.

Respectfully submitted,

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LEGEND

- EXCAVATION PIT
- BULLDOZER CUT
- TEST PIT
- IMPROVED ROAD
- UNIMPROVED ROAD
- ST. CL. 95 BOUNDRY
- TRANSMISSION LINE
- CADASTRAL SURVEY MONUMENT
- WELL
- ROCK OUTCROP

MAP BASE PREPARED FROM AERIAL PHOTOGRAPHS TAKEN 4/15/65

CHARLESTON GROUP

KAREN GROUP

CHARLESTON SPUR NO. I

N

QUARRY

APPROX LOCATION OF UNPATENTED LODE CLAIMS

SCALE IN MILES

0 1/4 1/2 1

INDEX MAP OF UNPATENTED PLACER MINING CLAIMS IN THE LONE MT. CANYON AREA